IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 1959 of 2005

In

First Appeal No.126 of 2001

M.N.T.Nair and Ors. ..Applicants

V/s

Oswal Alban D'souza and Ors..Respondents

Madhav Jamdar for Applicants

Mrs Leena J. Kambli for Respondent no.1

CORAM:S.R.SATHE,J.

DATED;2nd March 2006

P.C.:-

1. Heard the learned Advocates for the parties at length.

2. The applicants are the heirs of original Respondent no.1-plaintiff. They have filed the present C.A. for vacating the interim relief granted in favour of Oswal Alban D'Souza, original defendant no.1 in suit filed by the plaintiff bearing Suit NO.SC Suit No.3619 of 1991. By virtue of the agreement dated 12-5-1983 the said Oswal Alban D'Souza entered into an agreement whereby

he agreed to allot flat no.15, 1st floor, Wintor Apartment, Dominic Colony,Orlem, Malad (W), Mumbai to deceased plaintiff. However, plaintiff was not actually put in possession of the said flat and on the contrary the same was occupied by Oswal Alban D'souza. Hence deceased plaintiff filed the Suit NO.3619 of 1991 for declaration that agreement dated 12-5-1983 is binding on Oswal Alban D'Souza and for possession of the suit flat. Similarly Oswal D'Souza also filed Suit NO.3401 of 1991 for declaration that agreement is not binding on him. Both the suits were tried together and the same were decided against Oswal D'Souza i.e. present Respondent no.1.

3. Being aggrieved by judgment in the above mentioned suit Oswal D'Souza filed two appeals. In First Appeal No.126 of 2001 interim relief was granted in his favour whereby the execution of the decree passed in favour of the present applicant was stayed.

4. Since the time the present Respondent no.1 occupied the suit flat, he never paid any maintenance and other charges of the defendant no.8 Co Op Hsg Scy. He also did not pay the amount towards contribution to B.M.C. property tax, sinking fund, water tax, service charges, interest etc. The society found that the total amount of Rs.2,06,032/- was due from Respondent no.1 (Buildier/developer) by the end of 31-3-2003. The society therefore issued notice to the present

Respondent no.1 and called upon him to pay the said dues of the society and was also informed that on his failure to clear the dues the society may initiate proceedings under Section 101 of Maharashtra Co Op Societies Act, 1960.

5. It is an admitted fact that society did initiate proceedings under Section 101. Not only that but Deputy Registrar, Maharashtra Co Op Societies issued recovery certificate and it was directed that Respondent no.1 should pay to the Respondent no.8 Co Op Scy Rs.2,06,432-23 ps. as well as the interest at the rate of 21% on the said amount and the cost of the application. It was further directed by the Deputy Registrar that on Respondent's failure to pay the said amount the Respondent's property be attached and sold.

6. As applicants i.e. heirs of original plaintiff did not get the fruit of the decree passed in their favour they filed present application and prayed that the stay granted in first appeal be vacated so that they can get the possession. Besides this, the present applicant prayed that Respondent no.8 Co Op society be restrained from attaching and selling the suit flat.

7. Neither the applicant nor the Respondent no.1 have challenged the dues of the defendant no.8 society. Because of the dispute of the applicant and Respondent no.1, the defendant no.8 Hsg Scy should not suffer and

put to any loss or inconvenience. The society must get its dues. Probably, realising this fact, during the course of the argument the learned Advocate for the applicant and Respondent no.1 submitted that their respective client is ready to pay the above mentioned dues of the society without prejudice to their rights. The learned Advocate for the applicant submitted that on their payment of the said amount the stay be vacated so as to enable them to take possession. However, it is needless to say that if such course is allowed then the first appeal would practically become infractuous. So, instead of that, it is desirable to direct the Respondent no.1 to deposit the said amount. It is for 2 reasons. Firstly, because though decree for possession is passed against him he has not parted the possession because of the pendency of the appeal and interim relief. As against this, though decree is passed in favour of the plaintiff he is deprived of the fruits of the same during all these years. So, it is not desirable to vacate the stay at this stage but at the same time it is necessary to pass some such order which would protect the interest of both the parties and preserve the property.

8. In view of this, I pass the following order:

i. The interim relief granted in favour of present Respondent no.1 in First Appeal No.126 of 2001 is to continue till the disposal of the appeal on Respondent

no.1 making payment of Rs.2,06,032-15 ps. to the defendant no.1 society within a period of 3 weeks from today and giving an undertaking to clear the society's dues for the period subsequent to 31-3-2003 till today on or before 30th April 2006.

ii. Respondent no.1 shall not create any third party interest in the suit property in order to cause any damage to the suit property in any manner till the disposal of the appeal.

iii. The appellant in First Appeal No.126 of 2001 i.e. present Respondent no.1 to file paper book within period of 2 months from today and supply copy of the same to the present applicant.

iv. The present Respondent no.1 to take necessary steps for service on unserved Respondent no.7D within one month from today failing which the Civil Appeal shall automatically stand dismissed against the said Respondents for want of prosecution.

v. The hearing of the appeal is to be expedited and plaintiff is at liberty to move the Court in that behalf after the period of 2 months from today.

vi. On present Respondent no.1 complying the above conditions, the Respondent no.8 Co Hsg Society is restrained from attaching/selling the suit flat for

recovery of above mentioned dues.

vii. If respondent no.1 commits breach of any of the above conditions then the stay granted to the execution of the decree passed in favour of the present applicants shall automatically stand vacated.

. C.A. disposed of in the above terms.

(S. R. SATHE, J.)